

IN THE SUPREME COURT OF THE STATE OF ALASKA

J.P. AND S.P. (Foster Parents),

Appellants,

v.

State of Alaska, DHSS, G.C. (Mother),
W.F. (Father), J.F. (Child) and Sun'aq
Tribe of Kodiak,

Appellees.

Supreme Court No. S-18107

Trial Court Case No. 3AN-17-00032CN

**GUARDIAN AD LITEM'S BRIEF IN RESPONSE TO ORDER
DATED JULY 9, 2021 AND RESPONSE OF APPELLANT**

The guardian ad litem, an Appellee, files this memorandum addressing the questions presented by this Court: (1) whether the foster parents are parties, and if so (2) whether the public interest exception to the mootness doctrine applies.

Based upon the following, this Court should conclude that the foster parents were not parties to this matter below, but instead were permitted to make a limited entry of appearance to litigate placement.

In the alternative, should this Court find that the foster parents were parties to the trial court matter, this Court should conclude that the public interest exception to the mootness doctrine applies to their appeal.

I. PROCEDURAL & FACTUAL BACKGROUND

In a hearing on March 10, 2021, the foster parents appeared with counsel and filed an entry of appearance. The trial court advised that they could participate in an upcoming

deposition and placement review requested by the guardian ad litem. Counsel for the foster parents stated that she would file a written Motion to Intervene, but did not do so.

On March 11, 2021, the Tangirnaq Village delegated their authority to the Sun'aq Tribe of Kodiak. [Ex. 1] The next day, Sun'aq filed a Notice of Intervention. In April, Sun'aq filed a Petition to Transfer Jurisdiction to its tribal court. The foster parents filed an Opposition based upon multiple theories, including a lack of personal jurisdiction by the tribe. The guardian ad litem also filed an Opposition. The parents filed responses in support of tribal jurisdiction.

On May 26, 2021, the trial court entered an order transferring jurisdiction of this CINA matter to Sun'aq. The trial court denied requests to stay enforcement of the order made by the foster parents, the guardian ad litem, and the State. On June 9, the tribal court held a hearing and entered an order placing J.W. with relatives in New Mexico. This Court denied the foster parents' subsequent motions to stay the trial court order.

II. ARGUMENT

A. The foster parents cannot establish permissive intervention under the CINA statutes, rules, and existing case law in Alaska.

The foster parents cannot establish intervention as of right in a CINA matter.¹ A movant is entitled to intervene as of right if four conditions are met: “(1) [T]he motion [to intervene] must be timely; (2) the applicant must show an interest in the subject matter of the action; (3) the applicant must show that this interest may be impaired as a

¹ Alaska Civ. R. Proc. 24(a).

consequence of the action; and (4) the applicant must show that the interest is not adequately represented by an existing party.”²

At best, the foster parents can satisfy three of these requirements. The foster parents failed to file a motion,³ but to the extent they made an informal request to intervene, that was timely. The foster parents have shown an interest in the subject matter of the action, and that their interest in placement of J.W. may be impaired as a consequence of the action.

The guardian ad litem (GAL) submits that the foster parents cannot meet the final requirement; they cannot show that they have an interest that is not adequately represented by an existing party. The foster parents were endeavoring to act in J.W.’s best interests. The guardian ad litem, however, is specifically tasked with advocating for J.W.’s best interest.⁴ GAL Paul McDermott hired a psychologist to consider the impact of a placement change on J.W. Mr. McDermott’s purpose in doing so was for some of the very same reasons the foster parents wanted to participate in the placement review: concern that moving J.W. to a fit relative after significant time and bonding in the foster home would be traumatic. J.W.’s best interests were adequately represented by his GAL.

² *Alaskans for a Common Language, Inc. v. Kritz*, 3 P.3d 906, 911 (Alaska 2000) (citing *State v. Weidner*, 684 P.2d 103, 113 (Alaska 1984)).

³ It would be unmanageable if foster parents were permitted to participate as parties, without filing motions to intervene. Party status does not solely mean that a party can call witnesses and cross-examine other witnesses. Without limitations, party status could entitle intervenors to discovery of confidential information about parents and children.

⁴ CINA Rule 11(f).

The foster parents cannot establish permissive intervention under Civil Rule 24(b) and this Court’s recent decision in *Zander B.*⁵ A movant may seek permissive intervention so long as the “claim or defense and the main action have a question of law or fact in common.”⁶ In *Zander B.*, this Court emphasized that foster parent intervention “should be the rare exception rather than the rule.”⁷ The foster parents in *Zander B.* were permitted to intervene because they offered relevant evidence about the proposed placement that was unlikely to be offered by any other party.⁸

This case is distinguishable from *Zander B.* In *Zander B.*, the foster parents filed a motion to intervene, the parties responded, and the trial court entered a written order granting permissive intervention.⁹ In this case, counsel for the foster parents never filed a motion to intervene, and the court never entered an order permitting their intervention. The foster parents filed an Entry of Appearance, and the trial court permitted them to participate in hearings related to placement. Whereas in *Zander B.*, the GAL aligned herself with OCS and supported the proposed placement change for the child,¹⁰ in this case Mr. McDermott was actively contesting J.W.’s placement change. Finally, the foster parents here did not offer relevant evidence regarding the proposed placement that

⁵ *State, Dep’t of Health & Soc. Svcs. v. Zander B.*, 474 P.3d 1153 (Alaska 2020).

⁶ Civil Rule 24(b).

⁷ *Id.* at 1164.

⁸ *Id.* at 1164, 1170.

⁹ *Id.* at 1157.

¹⁰ *State v. Zander B.*, 474 P.3d at 1153.

would be unlikely to be introduced by an existing party as relied on in *Zander B.*¹¹ This Court should find that foster parents never formally intervened in this matter.

1. In the light most favorable to the foster parents, they were permitted to make a limited entry of appearance for purposes of litigating placement.

Even if this Court were to find that the trial court permitted the foster parents to intervene, it was a courtesy extended for the limited and narrow purpose of participating in the future placement review hearing requested by the guardian ad litem. The Indian Child Welfare Act (ICWA) Regulations are express that “any party to the child-custody proceeding must have the opportunity to provide the court with views regarding whether good cause to deny transfer exists.”¹² In *Zander B.*, this Court cautioned against overbroad orders of intervention allowing foster parents to participate in all placement review hearings.¹³ Given this limitation, the foster parents’ pleadings opposing a transfer of jurisdiction should not have even been considered, given they did not have actual party status and no motion to intervene was filed.¹⁴ Notably, the child’s placement is not a

¹¹ *Id.* at 1164, 1170.

¹² 25 C.F.R. § 23.118(b).

¹³ *Id.* at n.29 (“We note that the court’s order granting intervention stated that the foster parents were ‘permitted to intervene in any placement review hearing regarding [Douglas].’ This was clearly overbroad; there may be future placement reviews in which the foster parents have nothing substantive to add beyond evidence of their own attachment to the child, which, as we explain below, should not be sufficient to justify their intervention. We caution courts to limit foster parent intervention to specific upcoming proceedings.”)

¹⁴ Mr. McDermott joined the foster parents’ Opposition to the Petition to Transfer Jurisdiction in his own detailed Opposition, but because no motion to intervene was filed, he did not specifically respond regarding the limitations on their participation.

valid basis upon which to object to a transfer of jurisdiction.¹⁵ So, to the extent that the foster parents were constructively permitted to intervene for the limited issue of placement, that was not a basis for their continued involvement when the issue before the court became whether to transfer jurisdiction of this matter to the Sun'aq Tribe.

2. This Court should decline foster parents' invitation to broaden foster parent standing in CINA matters.

Party status in CINA cases is addressed in CINA Rule 2(l).¹⁶ The CINA Rules expressly state that an adult family member or family friend seeking review of a denial of a placement by OCS is not required to intervene and their participation is "limited to being a participant in the hearing concerning the denial of placement..."¹⁷ Similarly, where "a person files a petition for adoption or legal guardianship" they expressly do not become a party and may only participate in proceedings "that concern the person's

¹⁵ 25 C.F.R. § 23.118(c) In determining whether good cause exists, the court must not consider:

- (1) Whether the foster-care or termination-of-parental-rights proceeding is at an advanced stage if the Indian child's parent, Indian custodian, or Tribe did not receive notice of the child-custody proceeding until an advanced stage;
- (2) Whether there have been prior proceedings involving the child for which no petition to transfer was filed;
- (3) Whether transfer could affect the placement of the child;
- (4) The Indian child's cultural connections with the Tribe or its reservation; or
- (5) Socioeconomic conditions or any negative perception of Tribal or BIA social services or judicial systems.

¹⁶ CINA Rule 2(l) states that "Party" means the child, the parents, the guardian ad litem, the Department, and Indian custodian who has intervened, and Indian child's tribe which has intervened, and any other person who has been allowed to intervene by the court.

¹⁷ CINA Rule 19.1(e).

petition.”¹⁸ Even if the foster parents had filed an adoption petition, that fact alone would have made clear that they were not to be afforded party status under AS 47.10.111(d), but only an opportunity to participate in proceedings related to their petition.

The Appellants’ borrow heavily from Alaska civil custody case law in making their arguments. [At. Br. 6] The guardian ad litem urges this Court not to apply Alaska’s broad case law pertaining to standing in private civil custody actions to CINA cases.

Appellants’ argument that because AS 47.10.113 incorporates child custody statutes that “it follows” that standing requirements of Alaska’s civil custody law should be applied is without merit. [At. Br. 6] Alaska Statute 47.10.113 advises that where there is a request to modify custody or visitation involving a child in need of aid, that request will be heard as part of the CINA proceedings. It is true that AS 25.24.010 – AS 25.24.180 are expressly referenced statute for purposes of making, modifying, or vacating child custody orders.¹⁹ To argue that because civil custody statutes are referenced in a single CINA statute that this Court should import civil custody case law regarding standing into the CINA framework is well beyond the scope of what was contemplated by this Court in *Zander B.* and fails to recognize the distinct nature of CINA cases. This Court should decline to expand the law in CINA cases in this way.

The guardian ad litem urges this Court decline to recognize psychological parents or other interested persons in CINA cases. Elevating foster parents, who come to know a child through a contractual relationship with OCS, to the status of psychological parents

¹⁸ AS 47.10.111(d).

¹⁹ AS 47.10.113(c).

has the potential to eviscerate ICWA and state law preferences for relative foster placement. This Court should likewise decline to expand the law in this way.

B. The Public Interest Exception to the Mootness Doctrine applies to review of some orders transferring CINA matters to tribal jurisdiction.

The guardian ad litem submits that the public interest exception to the mootness doctrine should apply generally to orders transferring jurisdiction to tribal courts where the issue is preserved below and does not implicate prohibited considerations.²⁰ Failure to provide timely review of orders transferring jurisdiction means that there is no remedy for a party who opposes transfer of jurisdiction. Such a system would leave Alaska's most vulnerable children without meaningful review.

An otherwise moot appeal may go forward if three factors are met: “(1) whether the disputed issues are capable of repetition; (2) whether the mootness doctrine, if applied, may cause review of the issues to be repeatedly circumvented, and (3) whether the issues presented are so important to the public interest as to justify overriding the mootness doctrine.”²¹

All three factors are satisfied in this case. Certainly, the issue of a child protection matter being transferred to the jurisdiction of a tribal court will occur in the future and is therefore capable of repetition. If the mootness doctrine is applied, there will be no review of these decisions, leading to repeated and ongoing circumvention of review. And without question, the issues presented for Indian children, their parents, families,

²⁰ 25 C.F.R. § 23.118(c)(1-5). *See* n.15.

²¹ *Akpik v. State, Office of Management and Budget*, 115 P.3d 532, 535 (Alaska 2005) quoting *Kodiak Seafood Processors Ass’n v. State*, 900 P.2d 1191, 1195 (Alaska 1995).

tribes, and child welfare organizations are so important to the public interest as to justify overriding the mootness doctrine.

The guardian ad litem is not aware of an ongoing practice by the Sun'aq Tribe to assume jurisdiction of cases involving Indian children who are not their tribal members. The guardian ad litem's concern is that orders transferring jurisdiction be reviewed when the basis for objection does not involve the prohibited considerations identified in 25 C.F.R. § 23.118(c). A party's qualifying objections should not evade judicial review. In other words, orders to transferring child protection matters to tribal jurisdiction cannot be relegated to a basket of untouchable, unreviewable trial court orders.

In the alternative, should this Court find that the public interest exception does not apply, then other steps must be taken to avoid repeat circumvention of the review of orders transferring jurisdiction. Currently, "if the state court grants the transfer of jurisdiction, it shall retain jurisdiction pending exercise of the jurisdiction by the tribal court."²² This language leaves discretion in terms of the timing of the transfer to the tribal court and provides remaining parties with no guidance on when transfer will occur.

As identified in this Court's Order dated July 9, future trial courts must ensure that the CINA case does not transfer to the jurisdiction of the tribal court until *after* parties are given sufficient time and opportunity to file a motion for a stay and/or to reconsider, and if necessary, an appeal to this Court. In this circumstance, a party can file an appeal of an order transferring jurisdiction before transfer occurs. Delayed enforcement of orders

²² CINA Rule 23(h)(1).

transferring jurisdiction also alleviates practical issues that arise in these cases, regarding whether OCS or the Indian child's tribe is responsible for the child's care and supervision, transportation, and medical expenses during these periods of transition.

DATED at Anchorage, Alaska this 29th day of July 2021.

OFFICE OF PUBLIC ADVOCACY

/s/ Laura Hartz

Laura Hartz

Assistant Public Advocate

Attorney for Paul McDermott, GAL

AK Bar No. 0705020



March 11, 2021

Sun'aq Tribe of Kodiak
Attn: Linda Resoff, Social Services Director
312 West Marine Way
Kodiak, AK 99615

RE: ICWA Appointing Sun'aq Tribe Designated Tribal Agent

Dear Linda,

The Tangirnaq Native Village agrees to appoint Sun'aq Tribe of Kodiak as the Designated Tribal Agent to ensure ICWA is followed for placement. The father of the minor child is a member of the Tangirnaq Native Village, making the minor child a descendant of the Tribe, and concurs that ICWA applies throughout the entirety of this child welfare case. Because Tangirnaq Native Village does not have an ICWA Program, we are hereby appointing Sun'aq Tribe of Kodiak Social Services Department as the designated Tribal agent in this case to represent Tangirnaq Native Village in all further court proceedings.

Please keep Tangirnaq Native Village informed of proceedings and any updates on the case. We thank you for your willingness to assist in this case.

Quyanaa,

Gwen Sargent, TNV President



March 11, 2021

William Joseph Fuller
3520 N. Wolverine Dr.
Wasilla, AK 99654
D.O.B. 05/20/1971

Re: Your enrollment as a member of Tangirnaq Native Village (aka Woody Island)

Cama'i William,

This letter certifies that you are enrolled as a Tribal member of Tangirnaq Native Village (aka Woody Island), a federally-recognized Alaska Native Tribe. Your Tangirnaq Native Village enrollment number is **FUL2018-05**.

A tribal enrollment card is being sent to you at the address above. If you have any questions about membership in Tangirnaq Native Village, or to update your contact information, please contact the Tribal administration office by email at info@woodyisland.com, or by phone at (907) 486-9872.

Quyanaasinaq,

Shelly Peterson, Tribal Administrator
Tangirnaq Native Village (aka Woody Island)

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3

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8 W.F. (Father), J.F. (Child) And Sun'aq
9 Tribe of Kodiak.

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Supreme Court No. S-18107

11 Trial Court Case No. 3AN-17-00032CN

12 **CERTIFICATE OF SERVICE AND TYPEFACE**

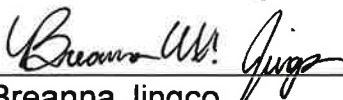
13 The undersigned certifies that, on this date, a copy of the GUARDIAN
14 AD LITEM'S BRIEF IN RESPONSE TO ORDER DATED JULY 9, 2021 AND
15 RESPONSE OF APPELLANT in this proceeding was mailed to:
16

17 Renee McFarland, Public Defender Agency renee.mcfarland@alaska.gov
18 Karen Hawkins, Office of Public Advocacy karen.hawkins@alaska.gov
19 Jessie Alloway, Attorney General's Office jessie.alloway@alaska.gov
Kenneth P. Jacobus jacobuskenneth@gmail.com
20 Anne Helzer annehelzer@helzerlaw.com
21 David Voluck, Sun'aq Tribe of Kodiak davidvoluck@msn.com

22 In accordance with Appellate Rule 512.5(c)(2) the undersigned further
23 certifies that the above-referenced document utilizes 13 Times New Roman font.

24 DATED in Anchorage, Alaska on this 29th day of July 2021.

25 OFFICE OF PUBLIC ADVOCACY

26 
27 Breanna Jingco
28 Paralegal I